ing a street car track can assume that the street car will run at a lawful speed, and is not contributorily negligent for going upon the track after once looking, and seeing no car approaching too close to prevent his crossing the track in safety, if the car was not exceeding the speed limits.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 136.]

3. Street Railroads (§ 117 (29)*)—Contributory Negligence of Driver of Horse Held for Jury.—The driver of a horse and wagon held, under the evidence, not contributorily negligent as a matter of law in driving upon the track without looking a second time, as a result of which he was struck by a car running at excessive speed, and which gave no warning.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 140.]

4. Street Railroads (§ 117 (34)*)—Speed of Street Car as Proximate Cause of Collision Held for Jury.—In an action for injuries to driver of a horse and wagon struck by a street car, evidence held sufficient as against demurrer to show that the proximate cause of the injury was the excessive speed of the street car.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 142.]

Error to Hustings Court of Richmond.

Action by W. J. Oliver against the Virginia Railway & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. R. Williams and *T. Justin Moore,* both of Richmond, for plaintiff in error.

L. O. Wendenburg and *T. Gray Haddon,* both of Richmond, for defendant in error.

VIRGINIA RY. & POWER CO. *v.* WELLONS.

June 15, 1922.

[112 S. E. 843-844.]

1. Street Railroads (§ 85 (4)*)—Vehicles Must Yield Right of Way to Street Car.—Where a street car had the right of way under a city ordinance, it is the duty of an automobile driver to yield if, when he started across the tracks, the relative position of the two vehicles was such that a reasonably prudent man would have foreseen that a collision was likely to occur unless one or the other stopped.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 136.]

2. Appeal and Error (§ 930 (1)*)—Testimony of Plaintiff's Witnesses Is Taken as True on Appeal from Verdict for Him.—Where there was conflict in the testimony as to the speed of the street car and the relative positions of the two vehicles, the facts as stated by

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

witnesses for the plaintiff, if sufficient to support a verdict for plaintiff, must be taken as true on review of the verdict.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 620.]

3. Street Railroads (§ 117 (24)*)—Contributory Negligence of Vehicle Driver for Jury.—The contributory negligence of an automobile driver injured by a street car is usually, though not always, a matter to be determined by the jury.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 143.]

4. Street Railroads (§ 117 (28)*)—Contributory Negligence of Automobile Driver Held for Jury.—Evidence that an automobile driver, when he started to turn by crossing a street car track within the block, saw a street car approaching at such distance that it could not reach him traveling at a lawful speed before he crossed the track, and that he was almost across when struck by the car, which ran 210 feet before it was stopped, held not to show contributory negligence as a matter of law.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 142.]

5. Appeal and Error (§ 1062 (1)*)—Error as to One Theory on Which Jury Might Have Found Verdict Is Prejudicial.—Where the jury might have found that an automobile driver was free from contributory negligence, but the issue of last clear chance was also submitted to them, so that their verdict for plaintiff might have been rendered notwithstanding a finding of contributory negligence, the Supreme Court of Appeals cannot say which theory was adopted by the jury, so that any error in the submission of the issue of last clear chance would be prejudicial.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

6. Street Railroads (§ 117 (35)*)—Negligence under Last Clear Chance Theory Held for Jury.—Where the testimony of defendant's motorman was self-contradictory, but from it the jury might have found he saw plaintiff's automobile crossing the track within such distance he should have known the collision would result if the speed of the car was not checked, and nevertheless failed to check the speed of the car until within 10 feet of the automobile, there was evidence, to sustain submission of the last clear chance theory, though the car could not have been stopped before reaching the place of collision, but if the speed had been checked the automobile could probably have gotten across before it was struck.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 389.]

7. Street Railroads (§ 103 (3)*)—Instruction on Last Clear Chance Held Not Erroneous for Omitting Unconsciousness of Danger.—Where the evidence showed that plaintiff was seen by defendant's motorman crossing the track in an automobile in such position that he could not have avoided a collision, however much he might have

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

realized his peril, an instruction authorizing recovery on the doctrine of last clear chance was not erroneous for failing to require the jury to find that the plaintiff must have appeared to the motorman to be unconscious of his peril.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 389.]

8. Street Railroads (§ 118 (15)*)—Instruction on Last Clear Chance Held Not to Impose Absolute Duty to Avoid Injury.—An instruction that, if defendant's, motorman, in the exercise of ordinary care, saw or ought to have seen plaintiff's danger in time to have avoided the accident, and failed to do so, plaintiff could recover notwithstanding his contributory negligence, was not erroneous as imposing on the motorman an absolute duty to avoid the accident, since the reference to ordinary care would naturally be understood as applying to avoiding the accident, as well as to seeing the danger.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 389.]

9. Trial (§ 260 (8)*)—Requested Instruction on Last Clear Chance Held Covered.—Where the court had given a charge correctly submitting the issue of last clear chance, a requested instruction referring to the previous instruction, and requiring the jury to find that plaintiff could not have extricated himself in time to avoid the accident, and that defendant's motorman should have seen the peril in time to avoid the accident, and that thereafter there elapsed an appreciable interval during which he could have avoided the accident, and plaintiff could not, and that the motorman negligently failed to do so, though it might appropriately have been given, stated no defense which could not have been made against recovery under the previous instruction, so that it was not error to refuse it

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 742.]

10. Street Railroads (§ 91*)—Ordinance Requiring Warning to Vehicles Not Limited to Those Driving Along Track.—A city ordinance requiring such motorman to keep a vigilant watch for all teams, carriages, or persons, and to strike a bell several times in quick succession on approaching within 100 feet, is not limited to vehicles moving along the track ahead of street cars, but applies to all teams, carriages, and persons, especially to an automobile on the track at a place other than a regular street crossing.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 613.]

11. Street Railroads (§ 91*)—Violation of Ordinance Negligence.—Where there was evidence tending to show that defendant's motorman violated a city ordinance requiring him to sound his bell, an instruction that, if the ordinance was violated, such violation was negligence on the part of defendant, was not erroneous.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 844.]

12. Appeal and Error (§ 1170 (1)*)—Fair Trial and Submission of

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Vital Facts Does Substantial Justice between the Parties.—Where the record satisfies the appellate court that the vital questions of fact were fairly submitted to the jury, and that the parties had a fair trial upon the merits, the law has done the best it can in attaining substantial justice between the parties, and the judgment rendered on the verdict will be affirmed, under Code 1919, § 6331.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 623.]

Error to Hustings Court of Richmond.

Action by J. D. Wellons against the Virginia Railway & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

M. M. McGuire and *T. Justin Moore,* both of Richmond, for plaintiff in error.

David A. Harrison, Jr., of Hopewell, and *Byrd & Gwathmey* and *Fulton & Wicker,* all of Richmond, for defendant in error.

MONROE & MONROE, Inc. *v.* COWNE.

June 15, 1922.

[112 S. E. 848.]

1. Evidence (§ 242 (1)*)—Admission of Evidence of Declarations of Agent of Seller of Machine about Efficiency of an Assistant in Installing Machinery Held Not Error.—In an action by a buyer of a milking machine against the seller for breach of warranty, admission in evidence of the declarations of the agent of the seller who was installing the machine concerning the efficiency of an assistant whom the buyer employed and whose efficiency was put in issue was not error, as it was within the scope of his employment.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 282.]

2. Evidence (§ 129 (6)*)—In Action for Breach of Warranty, Evidence that a Purchaser of Machine Like Plaintiff's Also Had Trouble with It Admissible.—In an action by the buyer of a milking machine against the seller for breach of warranty, evidence by the purchaser of another milking machine like plaintiff's as to its efficiency after a trial under circumstances narrated by the witness, and which tended to show that the machine was properly managed and attempted to be used as intended, was proper; its weight being for the jury.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 663.]

3. Evidence (§ 117*)—Evidence by Witness Who Did Not See Milking Machine Used as to Injured Condition of Udders of Plaintiff's Cows in Action for Breach of Warranty Admissible.—In an action by the buyer of a milking machine against the seller for breach

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.